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IN THE

Supreme Court of the United States

Term, 1974 No.

BUILDING & CONSTRUCTION TRADES COUNCIL OF PHILADELPHIA & VICINITY AND THIRTY-FOUR INDEPENDENT LABOR UNIONS AND/OR LABOR ORGANIZATIONS, *Petitioners*

v.

A. LEON HIGGINBOTHAM, JR., JUDGE, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Building and Construction Trades Council of Philadelphia and Vicinity and thirty-four (34) independent labor unions and/or labor organizations, hereinafter listed in Appendix "A", Petitioners, respectfully pray that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Third Circuit entered in the above case on August 13, 1974, in which the court denied petitioners' request that a writ of prohibition and/or mandamus be issued directing the United States District Court for the Eastern District of Pennsylvania to cease exercising jurisdiction in an "antitrust" action brought against fifty-six (56) trade unions in the greater Philadelphia area.

OPINIONS BELOW

This petition results from a decision by the United States Court of Appeals for the Third Circuit which denied, without opinion, a petition by these thirty-five (35) labor organizations for a writ of prohibition and/or mandamus, directing the United States District Court for the Eastern District of Pennsylvania to cease exercising jurisdiction in an "antitrust" action, titled, *Altemose Construction Co., et al. v. Building Construction Trades Council of Philadelphia and Vicinity, et al.* Civil Action No. 73-773.

The petition in the Circuit Court requested that the District Court be ordered to dismiss the action brought against fifty-six (56) trade unions, or in the alternative to stay all proceedings pending certification of the underlying labor issues for determination by the National Labor Relations Board. The relevant orders and decrees by the courts below were issued without opinion and are unreported. In chronological order, they are;

1. An order issued on December 31, 1973, by the United States District Court for the Eastern District of Pennsylvania, denying motions by all defendant unions to dismiss the anti-trust complaint (Appendix "B", infra, p. 2a);

2. An order issued on March 12, 1974, by the United States District Court for the Eastern District of Pennsylvania, denying a petition by all defendant unions for leave to file interlocutory appeals from the Court's December 31, 1973 order. (Appendix "C", infra, p. 3a);

3. An order issued on August 13, 1974 by the United States Court of Appeals for the Third Circuit, denying petitioners' request for the issuance of a writ of prohibition and/or mandamus to the District Court. (Appendix "D", infra, p. 4a).

JURISDICTION

The judgment of the Court of Appeals was entered on August 13, 1974. No order was made or sought respecting a rehearing or reconsideration. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

In the event this Court determines that the issuance of a writ other than certiorari might better aid the jurisdiction of this Court and the administration of justice, the petitioners also invoke the jurisdiction of this Court under the *All Writs Act*, as amended, 28 U.S.C. §1651(a).

STATUTES INVOLVED

This case involves the interpretation and application of the following Statutes: Sections 7, 8(b)(4)ii(A), 8(b)(4) ii(B) and 8(e) of the Labor-Management Relations Act of 1947, as amended, 61 Stat. 136, et seq., 29 U.S.C. §§157, 158(b)(4)ii(A), 158(b)(4)ii(B), 158(e); Sections 1, 2 and 5 of the Norris-LaGuardia Act, 47 Stat. 70, et seq., 29 U.S.C. §101, §102, §105; Sections 1 and 2 of the Sherman Antitrust Act, as amended, 69 Stat. 282, et seq., 15 U.S.C. §1, §2; Sections 4, 6 and 16 of the Clayton Act, 69 Stat. 282, et seq., 15 U.S.C. §§15, 17 and 26. They are printed in Appendix "E", infra. pp. 5a-10a.

QUESTIONS PRESENTED

1. In an antitrust action brought against fifty-six (56) trade unions, does a federal court lack jurisdiction under the Sherman or Clayton Acts where there is no allegation that the unions are acting in aid of a business conspiracy to gain price or market control?

2. In an antitrust action brought against fifty-six (56) trade unions, does a federal court lack jurisdiction under the Sherman or Clayton Acts where the action is brought only against the unions, and the Complaint fails to name

or otherwise identify any non-labor group with whom the unions are allegedly acting in concert?

3. Can unions, acting alone and in their own self-interest, be held subject to regulation under the antitrust laws simply because they may have engaged in conduct that arguably violates provisions contained in the Labor-Management Relations Act of 1947, as amended?

4. Where an antitrust action is grounded upon a theory that unions have lost their antitrust immunity because they allegedly have violated Section 8(b)(4) of the Labor-Management Relations Act, does a federal court possess jurisdiction under the Sherman or Clayton Acts to determine the underlying labor issues, or does the determination of such labor issues lie within the exclusive primary jurisdiction of the National Labor Relations Board?

STATEMENT OF THE CASE

A. *General Background*

This petition seeks review of a decision by the United States Court of Appeals for the Third Circuit in which that Court refused to consider the merits of a petition for writ of prohibition and/or mandamus.

The petition in the Circuit Court sought to halt an intrusion by the United States District Court for the Eastern District of Pennsylvania into areas that Congress has clearly excluded from federal court jurisdiction. By overreaching its jurisdiction, the District Court has created an imminent threat of irreparable harm or destruction to fifty-six (56) trade unions and labor councils in the greater Philadelphia area.[1]

It has now become imperative that immediate review of the District Court's ongoing actions be undertaken either by this Court, through the exercise of its power to issue extraordinary writs, or by the Circuit Court of Appeals on remand. The threatened destruction of petitioners' rights under federal labor laws is so imminent, and promises to be so devastating, that the normal appellate processes are totally inappropriate.

The petitioners herein are thirty-five (35) independent labor organizations, all of which are named as defendants in the antitrust action commenced in the District Court. In addition to the petitioners, twenty-one (21) other trade unions are also named as defendants in the same case.[2]

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1. The aggregate geographic jurisdiction of these unions encompasses the Pennsylvania counties of Philadelphia, Bucks, Chester, Montgomery and Delaware, and contiguous areas in the states of New Jersey and Delaware.

2. The other unions, with the exception of Local 542, International Union of Operating Engineers, AFL-CIO, filed motions to join in the request for relief by petitioners in the Circuit Court. Local 542 filed a petition for writ of prohibition and/or mandamus in its own behalf. Accordingly, all defendants in the District Court were represented in the Circuit Court and possess a vital interest in the outcome of this petition.

The "antitrust" action represents, in petitioners' view, a purposeful attempt by anti-labor groups to destroy or permanently impair the lawful functioning of all trade unions operating in the greater Philadelphia construction industry. The complaint stands as a monument to the distortion of federal notice pleading requirements, since by artfully phrasing allegations, plaintiffs were able to convince the District Court that a *prima facie* antitrust claim was stated—even though no mandatory jurisdictional facts are set forth in the compalint, and necessary parties were not joined.

The complaint contains no allegations concerning the existence of a business monopoly, no businessmen or business interests are named or otherwise identified who may allegedly have "conspired" with petitioners, and the plaintiffs have admittedly grounded the antitrust claim on an allegation that the unions are engaging in conduct prohibited under Section 8(b)(4) of the Labor Management Relations Act—a subject that Congress has placed within the exclusive primary jurisdiction of the National Labor Relations Board.

The dangers arising from the District Court's assumption of extra-jurisdictional authority are obvious when one considers the identities and the roles of the parties involved. On the one side is the Chamber of Commerce of the United States of America and the Associated Builders and Contractors, Inc., both national anti-labor groups representative of non-union contractors in the Philadelphia construction industry. They have joined with Altemose Construction Company, a non-union contractor with whom petitioners have engaged in various labor disputes, in this "antitrust" suit against every major labor organization that plays a part in determining the wage and benefit levels which union contractors must pay their employees.

The case below was framed in an antitrust, rather than a labor context, in order to obtain primary federal jurisdiction under the Sherman Act, 29 U.S.C. §1, et seq. Through this technique, the plaintiffs now have available to them

federal discovery procedures with which they hope to gain unimpeded access to petitioner's records on memberships, organizational activity, financial transactions, and protest planning. Once the case below progresses to the point where the plaintiffs gain access to these records—many of which involve petitioners' protected organizational activities against plaintiffs and their members—it will be inconsequential who wins or loses on the merits of the anti-trust issues.

Even should petitioners ultimately succeed at trial, or even should this Court ultimately decide, after trial, that the District Court had no jurisdiction in the first instance, your petitioners will have suffered damage that is irreparable. The jurisdictional issues raised herein must be determined preliminarily if such damage is to be avoided. A victory in this suit will give petitioners no cause to rejoice if their membership lists, organizational strategies or other confidential records are undergoing wholesale circulation among the memberships of nationwide anti-labor groups—a result that is certain to occur if plaintiffs are permitted continued access to the discovery procedures in the lower Court.

There can be only one victor in these circumstances, and it is not beyond logic to suggest that "discovery" is the main reason that this "antitrust" action was brought. The major problem now confronting the petitioners is that the District Court, leaning too heavily on the notice pleading concept, has permitted these discovery procedures to be invoked against labor organizations that Congress sought to insulate from such assaults. 29 U.S.C. §102. By not dismissing this action on its face, the District Court went beyond the limits of its jurisdiction. The Circuit Court, likewise seriously erred when it failed to exercise its supervisory powers and halt the usurpation of jurisdiction by the District Court.

B. *Proceedings in the District Court*

On April 3, 1973, a complaint entitled *Altemose Construction Company, Associated Builders and Contractors, Inc., and The Chamber of Commerce of the United States of America v. Building and Construction Trades Council of Philadelphia and Vicinity, et al.* was filed in the United States District Court for the Eastern District of Pennsylvania, Civil Action No. 73-773, charging a combination or conspiracy in violation of Sections 4 and 16 of the Clayton Act (15 U.S.C. §15, 26) and Sections 1 and 2 of the Sherman Act (15 U.S.C. §1, 2). (R. 5a-28a)[3]

The complaint alleges, in two separate counts, that defendant labor organizations have sought to force contractors in the construction industry to cease doing business with non-union sub-contractors through the medium of a "sub-contractors' agreement."[4] The plaintiffs allege, in Count I (R. 13a-24a), that such activity represents a combination or conspiracy to eliminate open-shop contractors from the construction industry, and that *unnamed* and *unidentified* non-labor groups may have joined in this conspiracy. In Count II (R. 24a-27a), the plaintiffs allege that defendant labor organizations engaged in the same conduct alleged in Count I, absent the participation of non-labor groups.

On July 16, 1973, the petitioners, together with all other defendants, moved to dismiss the complaint, *inter alia*, on the grounds that the lower court lacked jurisdiction under the Sherman or Clayton Acts; or in the alterna-

3. The relevant portions of the pleadings in the District Court were printed in the appendix to petitioners' request for relief in the Circuit Court. For the convenience of the Court, all page references in this petition will be to that appendix and will be designated as "R. . . ."

4. A subcontractors agreement requires that all work subcontracted at the construction site be subcontracted *only* to unionized employers. Such agreements have been sanctioned by Congress in the Labor-Management Relations Act of 1947, as amended, 29 U.S.C. §158(e).

tive, that since the case was grounded upon the alleged commission of unfair labor practices, the court should defer findings of fact and conclusions of law on all labor issues to the National Labor Relations Board (R. 29a-32a). On December 31, 1973, following the submission of briefs and oral argument, the lower court denied the motions to dismiss, without opinion. (Appendix "B", infra, p. 2a; R. 34a).

Thereafter, the petitioners sought leave of court to file an interlocutory appeal of the court's December 31, 1973 order under the provisions of 28 U.S.C. §1292. (R. 36a-39a). This motion was denied on March 12, 1974, also without opinion. (Appendix "C", infra, p. 3a; R. 41a).

On April 18, 1974, plaintiffs served separate sets of interrogatories and motions to produce documents on each petitioner and other defendants. The interrogatories (R. 43a-69a) contain over two hundred (200) questions (including sub-parts) requiring each labor organization to disclose lists of its memberships, identities of documents relating to memberships and protected activities, and the details of all Union activity during the past fourteen (14) years, including, *inter alia*, organizing the unorganized, gaining increased wages and benefits for their members, and lawful protests against employers paying destructively sub-standard wage scales. The interrogatories also seek disclosure of all activities, documents, identities of persons, dates, times, places, etc. relating to protected activities directed against plaintiffs and their members.[5]

After the filing by petitioners of objections to the interrogatories (R. 93a), the plaintiffs served notice, on June 21, 1974, of a motion to compel answers to the interrogatories (R. 109a-111a). At this juncture, petitioners requested the Circuit Court to intercede.

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5. The set of interrogatories set forth at R. 43a-69a is typical of the sets served on each labor organization.

C. *Proceedings in the Circuit Court*

On July 30, 1974, the petitioners filed a petition for a writ of prohibition and/or mandamus in the United States Court of Appeals for the Third Circuit, No. 74-1756, seeking an order by that court directing the District Court to cease exercising jurisdiction in the Altemose case, and to enter an order of dismissal, or alternatively, to stay proceedings pending certification of all labor issues to the National Labor Relations Board. Motions to join in this request were filed by other lower court defendants.

On August 13, 1974, the Circuit Court entered an order denying petitioners' request, without opinion (Appendix "D", infra, p. 4a). The court's action was taken without first requiring the respondents to answer the petition and without opportunity being given the petitioners for argument on the merits.

D. *Further Proceedings in the District Court*

The District Court is now continuing in its exercise of jurisdiction under the Sherman and Clayton Acts. On September 12, 1974, the court heard arguments relative to plaintiffs' motion to compel answers to the interrogatories. Further arguments were postponed until November 1, 1974. No decision has yet been rendered concerning the limitations, if any, on plaintiffs' discovery.

* * *

At the present time, the petitioners are faced with the ominous threat of national anti-labor groups, armed with federal discovery procedures, conducting a wholly unwarranted investigation into every possible area of protected activities in which petitioners have engaged. Although the limitations of discovery have yet to be determined by the District Court, the spectre of destruction for these unions is so real, and the danger so imminent that the intervention of this Court is necessary.

This petition represents the unions' last hope of avoiding the irreparable harm that will flow from even limited discovery by employer groups in a case where the District Court has no jurisdiction. If relief is not granted now, the damage will be *fait accompli* in subsequent appeals. In such event, this Court's appellate jurisdiction will have been defeated, and the concept of protected activities under federal labor laws dealt a staggering blow.

REASONS FOR GRANTING THE WRIT

I. The actions by the courts below are contrary to federal labor policy and in direct conflict with decisions of this Court.

1. The Circuit Court committed serious error when it refused to issue a writ of prohibition or mandamus. This failure to act in a case where the District Court is clearly overreaching its jurisdiction, constitutes an abnegation of the Circuit Court's duty to supervise its inferior courts.

The District Court lacks jurisdiction over the subject matter in the Altemose case since the Union conduct set forth in the complaint is immune from regulation under the antitrust laws. The complaint does not allege that businessmen are conspiring among themselves or in combination with others to restrain competition, fix prices, regulate markets or otherwise violate the antitrust laws. No businessmen are joined in the suit, none are identified, and there appears not one allegation that any "commercial" enterprise is violating the Sherman or Clayton Acts—only that fifty-six (56) labor organizations are doing so, either by themselves (Count II), or in combination with the mysteriously unnamed "others" (Count I).

The immunity of labor organizations from antitrust regulation is almost total, and this Court has acknowledged only one exception to the rule. Thus, where unions do not act in their own self interest and join with non-labor groups who are otherwise violating the Act, the immunity may be lost. *United States v. Hutchinson*, 312 U.S. 219, 61 S.Ct. 443, 85 L.Ed. 788 (1941).

The classic exception to the rule occurred in *Allen Bradley Co., et al. v. Local Union No. 3, International Brotherhood of Electrical Workers, et al.*, 325 U.S. 797, 65 S.Ct. 1533 (1945), where an antitrust action was brought against a combination of electrical contractors, suppliers and manufacturers engaged in price fixing and restrictive sales activity in New York City. The businesses were found

to have violated Sections 1 and 2 of the Sherman Act, and the Union that joined in the conspiracy was held subject to liability. The Court decided that the Union's participation did not immunize the business combination; rather, the Union lost its immunity when it joined in the unlawful business conspiracy.

In *Allen Bradley*, this Court required both allegations and proof that an unlawful combination among businessmen occurred. The Union only lost its antitrust immunity because of the proven antitrust violations of the businessmen with whom it had joined.[6] The existence of a business conspiracy was the *sine qua non* to the union's liability. This prompted the Court to state:

> ". . . had there been no union-contractor-manufacturer combination, the union's actions here, coming as they did within the exemptions of the Clayton and Norris-LaGuardia Acts, would not have been violations of the Sherman Act." 65 S.Ct. at 1539.

In *United Mine Workers of America v. Pennington*, 381 U.S. 657, 85 S.Ct. 1585 (1965), where eight (8) major coal companies, an employers' association, and a union were named as defendants and charged with price fixing and attempts to monopolize the bituminous coal industry, the Court stated the immunity rule in this manner:

> "A Union acting as a union in the interests of its members, and not acting to fix prices or allocate markets *in aid of an employer conspiracy to accomplish these objects* is not subject to challenge under the antitrust laws." 85 S.Ct. at 1614. (Emphasis added.)

The *Allen Bradley* rule, therefore, has remained essentially unaltered.

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6. The issue in *Allen Bradley* was stated by the Court as follows: ". . . do labor unions violate the Sherman Act when, in order to further their own interests as wage earners, they aid and abet businessmen to do the precise things which the Act prohibits)" 65 S.Ct. at 1536.

This Court has applied the foregoing criterion in each case involving antitrust allegations against unions. It is the corporate and business interests that the Sherman Act was designed to regulate; and suit must be brought, and succeed, against a business conspiracy in order for any union liability to attach.

In the present case, the complaint in the District Court does not state a cause of action against a business conspiracy. Instead, the complaint alleges a conspiracy among unions. The suit was brought only against unions, no businessmen were joined, and there appears not one allegation, even a suggestion, that businessmen are conspiring among themselves to restrain trade—only that the unions are engaging in such conduct.

A union cannot violate the antitrust laws by its own independent actions, nor can it violate those laws simply because it may enter into agreements with businessmen. If the rule were otherwise, every collective bargaining agreement could be construed as a conspiracy in restraint of trade. The labor immunity can only be lost when *businessmen* are actually violating the Sherman or Clayton Acts, by themselves, and a union joins or participates in that illegal activity. It is the conspiracies among businesses and commercial enterprises that the Sherman Act was intended to control.

The present case, perhaps, represents the first major degression from the established law regarding labor's immunity. In an action brought solely against fifty-six (56) trade unions and labor councils, the District Court has improperly assumed jurisdiction to determine whether the antitrust laws have been violated. The Circuit Court compounded this error by refusing, without comment, to hear argument on the vital jurisdictional issues.

2. The complaint in the District Court charges that fifty-six (56) unions, which plaintiffs concede are labor organizations within the meaning of the Labor-Management Relations Act, as amended, 29 U.S.C. §151, et seq., have conspired to restrain interstate commerce. Only the unions

are named as defendants and the only relief sought is against the unions. In this context, the case represents a dangerous throwback to the "conspiracy era," when labor unions were considered, *prima facie*, to be unlawful conspiracies in restraint of trade.

Prior to the advent of federal labor legislation, the courts generally frowned upon any concerted labor activity that could affect the free flow of goods in interstate commerce. In *Loewe v. Lawlor*,[7] a nationwide boycott of hats was held to violate the Sherman Act; in *Duplex Printing Press Company v. Deering*,[8] a secondary boycott of a printing press manufacturer violated the antitrust laws; and, in *American Steel Foundaries v. Tri-City Central Trades Council*[9] and the two *Coronado Coal*[10] cases, primary strike activity was deemed subject to regulation under the Sherman and Clayton Acts.

Fortunately for the labor movement, the "conspiracy era" was dealt a fatal blow in 1932 when Congress passed the Norris-LaGuardia Act, 29 U.S.C. §101, et seq. The Act, *inter alia*, fortified the provisions in Section 6 of the Clayton Act, 15 U.S.C. §17, relating to the exemption of labor unions from regulation under the antitrust laws.[11]

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7. 208 U.S. 274, 28 S.Ct. 301, 52 L.Ed. 488 (1908).

8. 254 U.S. 443, 41 S.Ct. 172, 65 L.Ed. 349 (1921).

9. 257 U.S. 184, 42 S.Ct. 72, 66 L.Ed. 189 (1921).

10. *United Mine Workers of America v. Coronado Coal Company*, 259 U.S. 344, 42 S.Ct. 570, 66 L.Ed. 995 (1922); *Coronado Coal Company v. United Mine Workers of America*, 268 U.S. 295, 45 S.Ct. 551, 69 L.Ed. 1963 (1925).

11. Section 5 of the Norris-LaGuardia Act (29 U.S.C. §105) provides:

> "No court of the United States shall have jurisdiction to issue a restraining order or temporary or permanent injunction upon the ground that any of the persons participating or interested in a labor dispute constitute or are engaged in an unlawful combination or conspiracy because of the doing in concert of the acts enumerated in section 104 of this title." Mar. 23, 1932, c. 90, §5, 47 Stat. 71.

Since Norris-LaGuardia, the federal courts have limited their application of antitrust regulatory powers to controlling business competition in the "commercial" or "product" markets. Labor unions functioning exclusively in the "labor markets" are no longer subject to the antitrust laws. *Cox*, 104 U. of Pa. Law Review, 252, 254 (1956). The decisions rendered by the courts in *Loewe v. Lawlor, supra; Duplex Printing Press Co. v. Deering, supra*, and other early cases are no longer considered to be binding.

In the first major antitrust/labor decision following passage of the Norris-LaGuardia Act, *Apex Hosiery Co. v. Leader, et al.*, 310 U.S. 469, 60 S.Ct. 982 (1940), this Court defined the narrow scope of the Sherman Act:

> "It was another and quite a different evil at which the Sherman Act was aimed. It was enacted in the era of 'trusts' and of 'combinations' of *businesses* and of *capital* organized and directed to control of the market by suppression of competition in the marketing of goods and services, the monopolistic tendency of which had become a matter of public concern. The end sought was the prevention of restraints to free competition in *business* and *commercial* transactions . . . " (Emphasis added.)

60 S.Ct. at 991, 2.

As a result of this Court's decision in *Apex* and a later case, *United States v. Hutchinson, supra*, the limits of federal court jurisdiction under the antitrust laws were clarified. The guidelines provide that where unions act alone and function in the labor market, their conduct cannot violate the antitrust laws regardless of whether it involves primary strike activity, secondary boycotts or even violence in the course of labor disputes. The antitrust statutes simply are not designed to regulate labor conduct in a labor market.

The validity of the distinction between "product markets" subject to regulation under the antitrust laws, and

"labor markets" was underscored by Congress when it passed the Labor-Management Relations Act of 1947, as amended, 29 U.S.C. §151, et seq. In this Act, Congress vested exclusive regulatory power over primary and secondary union activities in the National Labor Relations Board. Thus, by Congressional mandate, the "labor market" became subject to regulation in an entirely different forum than the "product market." See *National Woodwork Manufacturers' Association v. N.L.R.B.*, 386 U.S. 612, 87 S.Ct. 1250 (1967); *San Diego Building Trades Council v. Garmon*, 359 U.S. 239, 79 S.Ct. 773 (1959).

The present case has reached this Court because neither the Circuit Court, nor the District Court, has learned from the lessons of history and case law. The plaintiffs below are seeking a return to the "conspiracy era" with full antitrust regulation of primary and secondary boycott activity—a situation that existed in the days of *Duplex Printing Press Company, supra*, but has not been permitted since the enactment of the Norris-LaGuardia Act.

The complaint in the lower court states its cause of action against fifty-six (56) trade unions only. *No businessmen or business enterprises are joined or are otherwise identified in the complaint.* The vague allegation in Count I that unnamed and unidentified business interests participated in the alleged conspiracy seems only to be a self-serving conclusion to aid plaintiffs jurisdictional arguments—particularly since only the unions are being sued, and the only relief being requested is against the unions.

Since the enactment of the Norris-LaGuardia Act, the courts have not permitted any antitrust actions to be brought against unions functioning exclusively in the "labor market." Unlike the situation that existed prior to Norris-LaGuardia, when antitrust suits brought solely against unions were commonplace, the courts have now signaled an end to the "conspiracy era." Indeed, *Apex Hosiery Co. v. Leader, supra*, was the last major antitrust case to reach this Court in which suit was brought solely against a union—and there, this Court rejected the argu-

ment that unions, acting alone and functioning as unions, can violate the antitrust laws.[12]

The case below, like *Apex*, is an antitrust action brought only against unions. The complaint does not identify, name or even mention any individual or company (other than plaintiffs) who functions in a "product" or "commercial" market. By refusing to dismiss the case, the District Court ignored the intentions of Congress and the teachings of this Court. The Circuit Court, likewise, abnegated its duty when it failed to stop the usurpation of jurisdiction by the District Court—especially in a case where the District Court's action may cause irreparable harm that cannot be remedied by subsequent appellate proceedings.

An antitrust action brought solely against unions, acting alone or in combination among themselves, is jurisdictionally defective. The Circuit Court erred in not granting petitioners' request for a writ of prohibition and/or mandamus.

II. The case raises a vital question concerning a conflict in jurisdiction between the federal courts and the National Labor Relations Board, which has not been, but should be, decided by this Court.

The major issue raised in the District Court case concerns whether petitioners and other defendant unions have violated Sections 8(b)(4)ii(A) and 8(b)(4)ii(B) of the Labor-

12. Cases where "businessmen associations" labelled themselves as unions and thus sought antitrust immunity have reached this Court since *Apex*; e.g. *Los Angeles Meat and Provision Drivers Union, Local 626, et al. v. United States*, 371 U.S. 94, 83 S.Ct. 162 (1962). These cases are distinguishable, however, since the real defendants in the suit were businessmen, and not labor organizations as defined by law. In the present case, plaintiffs have not alleged that the fifty-six (56) trade unions and councils are anything other than labor organizations as defined in the Labor-Management Relations Act as amended, 29 U.S.C. §151, et seq. Indeed, the complaint concedes that petitioners are legitimate labor organizations.

Management Relations Act of 1947, as amended, 29 U.S.C. §158(b)(4)ii(A), 158(b)(4)ii(B). The plaintiffs below have grounded their theory of recovery on the assertion that petitioners and other unions have entered into "hot cargo" agreements with employers in violation of §8(b)(4)ii(A), and have engaged in conduct designed to force non-union contractors to sign such agreements in violation of §8(b)-(4)ii(B). The argument is that, since the unions have allegedly committed unfair labor practices, they have lost their antitrust immunity.

At the threshhold of this case then stands the issue of—in what forum are the alleged unfair labor practices to be decided? The District Court apparently feels that it has jurisdiction under the Sherman or Clayton Acts to determine whether the unions have committed unfair labor practices. This Court has never squarely addressed the issue, but has established guidelines that, when applied, show the District Court's judgment to be clearly erroneous.

In *Local 189, Amalgamated Meat Cutters and Butcher Workmen of North America, AFL-CIO, et al. v. Jewel Tea Company, Inc.*, 381 U.S. 675, 85 S.Ct. 1596 (1965), the Union and defendant employers were charged with violating the *Sherman Act* by implementing a clause in their collective bargaining agreements which restricted the hours during which the food operators could supply meat to their customers. On review, the Union argued, *inter alia*, that the pivotal issue in the case was whether the operating hours restriction is a term or condition of employment and that the District Court should have held the case on its docket pending a Board proceeding to resolve that issue.

This Court agreed with the general proposition that, where an antitrust case is grounded upon activity that is arguably protected or prohibited by the Labor-Management Relations Act, the Board has exclusive primary jurisdiction. The Court disagreed, however, that the pivotal issue under the *Jewel Tea* facts involved protected or prohibited conduct and, therefore, decided that deferral was not appropriate in that case.

The present case differs markedly from the facts in *Jewel Tea*, and is a prime example of a situation in which deferral is appropriate. Here the action is brought only against labor organizations and is grounded upon allegations of conduct that arguably involves the commission of unfair labor practices. The plaintiffs contend that, since petitioners have violated §8(b)(4) of the Act, the unions are now subject to regulation under the antitrust laws. Accordingly, whether petitioners immunity has been lost, or can be lost by such conduct, is an issue that must await a primary determination that the conduct itself is prohibited under the L.M.R.A.

Several lower courts have been confronted with almost identical issues. In *Carpenters District Council, etc. v. United Contractors Ass'n. of Ohio, Inc.*, 484 F.2d 119 (6th Cir. 1973), the Court decided that an antitrust action in the District Court must be stayed pending a Board determination of labor issues which were pivotal to plaintiffs' theory of recovery. An identical result was reached by the Circuit Court below in an opinion that was subsequently retracted for reasons not relating to the principles discussed. See *International Association of Heat and Frost Insulators and Asbestos Workers, etc., et al. v. United Contractors' Ass'n., Inc. of Pittsburgh, Penna.*, 483 F.2d 384 (3rd Cir. 1973); opinion retracted — F.2d — (3rd Cir. 1974). More recently, the United States District Court for the Southern District of New York dismissed an antitrust action because it was grounded on a theory that unfair labor practices were committed. The court held that, since the conduct is arguably protected or prohibited under the L.M.R.A., the jurisdiction of the National Labor Relations Board is exclusive. *Bernstein, et al. v. Universal Pictures, Inc., et al.*, — F.Supp. —, 87 LRRM 2081 (decided June 28, 1974).

In each of the foregoing cases, the lower courts accepted the instruction of this court on the issue of preemption. The *Jewel Tea* case sanctioned application of the doctrine to antitrust cases, and was wholly consistent with

prior decisions dealing with pre-emption in other forums. See *Keogh v. Chicago & N.W. Ry. Co.*, 260 U.S. 156, 43 S.Ct. 47, 67 L.Ed. 183 (1922); *Far East Conference v. United States*, 342 U.S. 570, 72 S.Ct. 492, 96 L.Ed. 576 (1952); *Carnation Co. v. Pacific Westbound Conference*, 383 U.S. 213, 86 S.Ct. 781, 15 L.Ed. 2d 709 (1966).

The very same procedures for deferral were available to the Circuit Court and the District Court here. There is no logical or legally justifiable reason why these courts ignored their obligation to honor the Board's exclusive jurisdiction. The very silence of the judges below and their failure to offer any explanation for the attachment of federal court jurisdiction is perhaps the most unrealistic element of this case.

The pre-emption issue raised herein must be addressed foursquare by this court. The entire range of petitioners' protected activities stands threatened by the District Court's usurpation of jurisdiction and the Circuit Court's refusal to act.

III. The need for granting the writ is urgent.

This case differs from virtually every other reported anti-trust/labor case that petitioners have been able to locate. In other cases, antitrust actions were brought against *employer conspiracies and unions*. Accordingly, the limits of relevant discovery were narrowly defined by the pleadings. In *Allen Bradley, supra*, the plaintiffs explored the relationship between the union and the *named* defendant contractors. In *Pennington, supra*, relevant discovery involved the negotiation of specific agreements between the United Mine Workers and eight (8) major coal companies, all *named* defendants. In *Jewel Tea, supra*, relevant discovery involved the 1957 negotiations between the Union and the Food Retailers Association, again, all *named* defendants.

In the present case, the District Court has improperly

assumed jurisdiction in a case brought solely against unions. Since the plaintiffs have not brought suit against a *business conspiracy* or even identified any alleged business conspirators, factors that were present in every other antitrust case against unions, the "relevant" discovery here may be found to have no limitation. Knowing this to be true, plaintiffs have filed Interrogatories (R. 43a-69a) that seek out the details of every conversation, every discussion, every organizational drive, every protest, and every agreement engaged in by petitioners, their officers, employees or members, during the past fourteen (14) years.

In other antitrust cases, the fact that the pleadings described the relationship of the union to the business conspiracy would necessarily protect the union from fishing expeditions by non-labor groups. Discovery would be properly limited to the factors surrounding the alleged relationships between the union and one or several named employers.

Here, the plaintiffs have not identified the non-labor parties to the alleged conspiracy. They claim that the unions themselves formed the core of the conspiracy, and that unidentified "others" may have participated. Accordingly, they seek to feret through petitioners' files looking for evidence of unlawful activity. To aid them in their search, they have requested open access to petitioners' membership files, organizational files, etc.—including all information relating to organizational efforts involving plaintiffs and their members.

In declaring the federal labor policy, Congress intended to severely limit the jurisdiction of federal courts so that employer groups could no longer use the potentially destructive weapons theretofore available against labor unions. The policy states that the worker shall have:

> ". . . full freedom of association, self organization, and designation of representatives of his own choosing, to negotiate the terms and conditions of his employment, and that he shall be free from the inter-

> ference, restraint or coercion of employers of labor, or their agents, in the designation of such representatives or in self organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection . . ." 29 U.S.C. §102.[13]

By usurping the jurisdiction of other federal agencies and exposing, for plaintiffs' use, a full panorama of federal discovery procedures, the District Court has unsheathed the same deadly weapons that were used to destroy unions in the days preceding the Norris-LaGuardia Act.

The courts below have improperly removed the Norris-LaGuardia protections from more than fifty thousand (50,000) workers who are members of the Building Trades Council and affiliated unions. The discovery weapons now available to plaintiffs, with the sanction of the District Court, may sound a death knell to the freedom of expression rights of every trade unionist in the greater Philadelphia area.

The Circuit Court improperly refused to act. The need for intervention by this Court is urgent.

IV. The case is of extreme public importance.

The issues raised herein are of paramount importance not only to the fifty-six (56) labor organizations directly involved, but also to every union, labor council and employee group throughout the country. If any employer, or any anti-labor group, can gain access to union membership lists, organizational strategies, negotiation memoranda, or financial records by the simple technique of bringing an antitrust action against a union, the protections con-

13. Section 7 of the Labor-Management Relations Act of 1947, as amended, 29 U.S.C. §157 and Section 1 of the Norris-LaGuardia Act 29 U.S.C. §101, are also relevant to the declared public policy.

tained in federal labor legislation will be rendered meaningless for all unions, and all employees.

The potential dangers are infinite. An employer facing negotiations with a union need only bring suit and invoke discovery to determine what the unions' bottom line settlement figure will be. A company fighting a union organizational campaign can bring suit, invoke discovery, and receive the names of all union sympathizers on its payroll. These are only some of the dangers facing your petitioners.

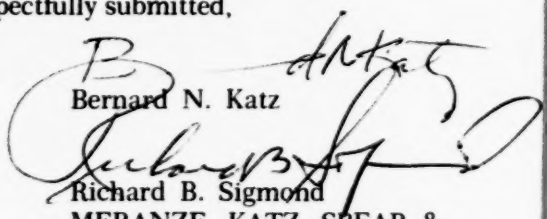
The Circuit Court below has made certain that Altemose will have access to discovery procedures that can reveal the names of all union sympathizers on its payroll. The Chamber of Commerce, similarly, may gain access to memoranda involving negotiations between these unions and their members. In addition, thousands of pages of equally confidential documents are now subject to discovery. It is inconsequential that the District Court has not yet determined the limitations on "relevant" discovery. The mere exercise of jurisdiction by the Court, coupled with the invocation of discovery procedures by plaintiffs, makes certain that some confidential information will be received by the employer groups. Many people are going to be injured and many institutions destroyed—all because the District Court has gone beyond the limits of its jurisdiction, and the Circuit Court refused to hear argument.

The intervention by this Court in situations of grave public importance is not unprecedented. See *United States Alkali Export Ass'n., Inc., et al. v. United States*, 325 U.S. 196, 65 S.Ct. 1120 (1945); *In Re: National Labor Relations Board*, 304 U.S. 486, 58 S.Ct. 1001 (1938). The issues raised in this case are so important to labor organizations everywhere, and so vital to petitioners continued existence, that such extraordinary relief is warranted.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted.

Respectfully submitted,



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APPENDIX "A"

List of Unions and Labor Councils Joining in this Petition

1) Building & Construction Trades Council of Philadelphia & Vicinity
2) Asbestos Workers Local 14
3) Boilermakers Local 13
4) Bricklayers Local No. 1
5) Bricklayers Local 12
6) Bricklayers Local 54
7) Building Service Employees Local 69 now Local 36
8) Carpenters Metropolitan District Council
9) Cement Masons Local 592
10) Custom Furniture and Drapery Workers, Local 443
11) Electricians Local 98
12) Electricians Local 380
13) Electricians Local 610
14) Electricians Local 654
15) Lathers Local 53
16) Lathers Local 492
17) Lead Burners Local 532
18) Linoleum Layers & Floor Coverers, Local 1823
19) Millwrights & Machinery Erectors, Local 1906
20) Painters District Council No. 21
21) Painters Union Local 921
22) Pipetrades Council No. 31
23) Plasterers Local 8
24) Plasterers Local 574
25) Plumbers & Steamfitters Local 428
26) Roofers Local 30
27) Sheet Metal Workers Local 19
28) Sheet Metal Workers Local 153
29) Signmakers and Hangers Union, Local 194
30) Sign & Pictorial Painters Local 1159
31) Sprinkler Fitters Local 692
32) Stationary Engineers Local 835
33) Steamfitters Local 420
34) Tile Layers Local No. 6
35) Wharf & Dock Builders Local 454

APPENDIX "B"

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CIVIL ACTION NO. 73-773

ALTEMOSE CONSTRUCTION COMPANY, ASSOCIATED BUILDERS AND CONTRACTORS, INC., THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA

v.

BUILDING & CONSTRUCTION TRADES COUNCIL OF PHILADELPHIA AND VICINITY; et al.

ORDER

AND NOW, this 31st day of December, 1973, after hearing extensive oral argument from distinguished counsel and upon consideration of the briefs and other supporting documents, it is hereby ORDERED that the Motions of the Defendants to Dismiss this action are hereby DENIED.

BY THE COURT:

J.

APPENDIX "C"

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CIVIL ACTION NO. 73-773

ALTEMOSE CONSTRUCTION COMPANY, ASSOCIATED BUILDERS AND CONTRACTORS, INC., THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA

V.

BUILDING & CONSTRUCTION TRADES COUNCIL OF PHILADELPHIA AND VICINITY, ET AL.

FILED
MAR. 12, 1974

JOHN J. HARDING, *Clerk*
By Doc. Dep. Clerk

ORDER

AND NOW, this 12th day of March, 1974, upon consideration of Defendants' Petition for Leave to Appeal pursuant to 28 U.S.C. §1292(b) and the Plaintiffs' Response thereto, it is hereby ORDERED that said Petition is DENIED.

BY THE COURT:

J.

APPENDIX "D"

IN THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 74-1756

BUILDING & CONSTRUCTION TRADES COUNCIL OF PHILADELPHIA AND VICINITY and Thirty-four Independent Labor Unions and/or Labor Organizations,
Petitioners

v.

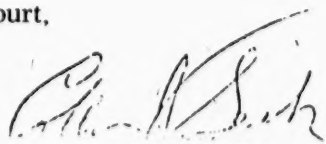
THE HONORABLE A. LEON HIGGINBOTHAM, JR., JUDGE OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA,
Respondent

Present: SEITZ, *Chief Judge* and ALDISERT and GIBBONS, *Circuit Judges*.

Upon consideration of petitioner's application for Writ of Prohibition and Writ of Mandamus in the above-entitled case;

It is ORDERED that petitioner's application for Writ of Prohibition and Writ of Mandamus be and hereby is denied.

By the Court,



Chief Judge

Dated: August 13, 1974

APPENDIX "E"

STATUTORY PROVISIONS

LABOR-MANAGEMENT RELATIONS ACT OF 1947, AS AMENDED, (29 U.S.C.A. §151, ET SEQ.)

"§157. Right of employees as to organization, collective bargaining, etc.

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title.

July 5, 1935, c. 372, §7, 49 Stat. 452; June 23, 1947, c. 120, Title I, 101, 61 Stat. 140."

§158. Unfair Labor Practices

(b) It shall be an unfair labor practice for a labor organization or its agents—

(ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is—

(A) forcing or requiring any employer or self-employed person to join any labor or employer organization or to enter into any agreement which is prohibited by subsection (e) of this section;

(B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person, or forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 159 of this title: *Provided*, That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing;

"§158. Unfair labor practices

(e) It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person, and any contract or agreement entered into heretofore or hereafter containing such an agreement shall be to such extent unenforcible and void: *Provided*, That nothing in this subsection shall apply to an agreement between a labor organization and an employer in the construction industry relating to the contracting or subcontracting of work to be done at the site of the consruction, alteration, painting, or repair of a building, structure, or other work . . ."

NORRIS-LAGUARDIA ANTI-INJUNCTION ACT, 29 U.S.C.A. §§101-110

"§101. Issuance of restraining orders and injunctions; limitation; public policy

No court of the United States, as defined in this chapter, shall have jurisdiction to issue any restraining order or temporary or permanent injunction in a case involving or growing out of a labor dispute, except in a strict conformity with the provisions of this chapter; nor shall any such restraining order or temporary or permanent injunction be issued contrary to the public policy declared in this chapter.

Mar. 23, 1932, c. 90, §1, 47 Stat. 70."

§102. Public policy in labor matters declared

In the interpretation of this chapter and in determining the jurisdiction and authority of the courts of the United States, as such jurisdiction and authority are defined and limited in this chapter, the public policy of the United States is declared as follows:

Whereas under prevailing economic conditions, developed with the aid of governmental authority for owners of property to organize in the corporate and other forms of ownership association, the individual unorganized worker is commonly helpless to exercise actual liberty of contract and to protect his freedom of labor, and thereby to obtain acceptable terms and conditions of employment, wherefore, though he should be free to decline to associate with his fellows, it is necessary that he have full freedom of association, self-organization, and designation of representatives of his own choosing, to negotiate the terms and conditions of his employment, and that he shall be free from the interference, restraint, or coercion of employers of labor, or their agents, in the designation of such representatives or in self-

organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, therefore, the following definitions of and limitations upon the jurisdiction and authority of the courts of the United States are enacted.

Mar. 23, 1932, c. 90, §2, 47 Stat. 70.

§105. Doing in concert of certain acts as constituting unlawful combination or conspiracy subjecting person to injunctive remedies

No court of the United States shall have jurisdiction to issue a restraining order or temporary or permanent injunction upon the ground that any of the persons participating or interested in a labor dispute constitute or are engaged in an unlawful combination or conspiracy because of the doing in concert of the acts enumerated in section 104 of this title.

Mar. 23, 1932, c. 90, §5, 47 Stat. 71.

Sherman Anti-Trust Act, 15 U.S.C.A., §1, et seq.)

§1. Trusts, etc., in restraint of trade illegal; exception of resale price agreements; penalty

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal: *Provided*, That nothing contained in sections 1 to 7 of this title shall render illegal, contracts or agreements prescribing minimum prices for the resale of a commodity which bears, or the label or container of which bears, the trademark, brand, or name of the producer or distributor of such commodity and which is in free and open competition with commodities of the same general class produced or distributed by others, when contracts

or agreements of that description are lawful as applied to intrastate transactions, under any statute, law, or public policy now or hereafter in effect in any State, Territory, or the District of Columbia in which such resale is to be made, or to which the commodity is to be transported for such resale, and the making of such contracts or agreements shall not be an unfair method of competition under section 45 of this title: *Provided further*, That the preceding proviso shall not make lawful any contract or agreement, providing for the establishment or maintenance of minimum resale prices on any commodity herein involved, between manufacturers, or between producers, or between wholesalers, or between brokers, or between factors, or between retailers, or between persons, firms, or corporations in competition with each other. Every person who shall make any contract or engage in any combination or conspiracy declared by sections 1 to 7 of this title to be illegal shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

July 2, 1890, c. 647, §1, 26 Stat. 209; Aug. 17, 1937, c. 690, Title VIII, 50 Stat. 693; July 7, 1955, c. 281, 69 Stat. 282.

"§2. Monopolizing trade a misdemeanor; penalty

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

July 2, 1890, c. 647, §2, 26 Stat. 209; July 7, 1955, c. 281, 69 Stat. 282."

CLAYTON ACT, 15 U.S.C.A. §15, ET SEQ.

"§15. Suits by persons injured; amount of recovery

Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefore in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

Oct. 15, 1914, c. 323, §4, 38 Stat. 731."

"§17. Antitrust laws not applicable to labor organizations

The labor of a human being is not a commodity or article of commerce. Nothing contained in the antitrust laws shall be construed to forbid the existence and operation of labor, agricultural, or horticultural organizations, instituted for the purposes of mutual help, and not having capital stock or conducted for profit, or to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects thereof; nor shall such organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade, under the antitrust laws.

Oct. 15, 1914, c. 323, §6, 38 Stat. 731."

"§26. Injunctive relief for private parties; exception

Any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the antitrust laws . . ."

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974.

Nos. 74-412, 74-557.

BUILDING & CONSTRUCTION TRADES COUNCIL OF PHILADELPHIA & VICINITY AND THIRTY-FOUR INDEPENDENT LABOR UNIONS AND/OR LABOR ORGANIZATIONS,

Petitioners in No. 74-412,

AND

LOCAL 542, INTERNATIONAL UNION OF OPERATING ENGINEERS,

Petitioner in No. 74-557,

v.

A. LEON HIGGINBOTHAM, JR., JUDGE,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI ON BEHALF OF ALL THREE NAMED PLAINTIFFS.

INTRODUCTION.

This is a brief in opposition to two petitions for certiorari, one of which was filed on October 11, 1974, by thirty-five of fifty-seven defendants in an antitrust action pending in the United States District Court for the Eastern District of Pennsylvania, the other of which was filed on November 8, 1974, by another defendant in the same case. The ostensible purpose of petitioners is to obtain review of the denials by the United States Court of Appeals for the Third Circuit of petitions for mandamus which sought review of an interlocutory order of the District Court denying petitioners' motions to dismiss the complaint.

COUNTERSTATEMENT OF QUESTIONS PRESENTED.

1. Where it is alleged in an antitrust action in the federal district court that defendant Trades Council and its constituent member labor organizations have unlawfully combined and conspired among themselves and with non-labor entities, including contractors, suppliers, and lending institutions, to restrain trade and to create a monopoly for the union contractors, did the Court of Appeals commit serious error warranting review by this Court when it denied petitioners' requests for the issuance of a writ of mandamus and/or prohibition, which requests sought review of the denial by the District Court of the defendants' motions to dismiss the Complaint?

2. Where the stated purpose of the petitions for certiorari is to forestall consideration of a discovery motion in the District Court, and there is no indication that the District Court will not protect petitioners' rights under applicable law, is the case of such imperative public importance as to justify the deviation from normal appellate processes and to require immediate settlement in the Supreme Court?

COUNTERSTATEMENT OF THE CASE.

A. Parties.

The petitioners in No. 74-412 are the Building and Construction Trades Council of Philadelphia and Vicinity and thirty-four (34) of its constituent members (hereinafter referred to collectively as the "Trades Council"), all of whom are defendants in a civil action pending in the United States District Court for the Eastern District of Pennsylvania, which action is entitled *Altemose Construction Company, Associated Builders and Contractors, Inc., and the Chamber of Commerce of the United States of America v. Building and Construction Trades Council of Philadelphia and Vicinity, et al.*, Civil Action No. 73-773 (hereinafter referred to as the "antitrust action").

Petitioner in No. 74-557 is another defendant in the antitrust action, Local 542, International Union of Operating Engineers (hereinafter referred to as "Local 542").[1]

The nominal respondent is the Honorable A. Leon Higginbotham, Jr., a United States District Court Judge of the United States District Court for the Eastern District of Pennsylvania, to whom the antitrust action has been assigned.

This brief is filed on behalf of the three named plaintiffs in the antitrust action: the Altemose Construction Company, the Associated Builders and Contractors, Inc., suing on behalf of itself and its members who are open-shop contractors[2] in the greater Philadelphia area, and the

1. Twenty-one other defendant unions have not joined in either petition.

2. An open-shop contractor is "a contractor who does not employ exclusively persons acceptable to or represented by defendants, and does not limit subcontracting exclusively to subcontractors having contracts with or acceptable to defendants" (R. 12a). An open-shop contractor is to be distinguished from a "non-union" contractor as the open-shop contractor may hire union subcontractors.

Chamber of Commerce of the United States of America, suing on behalf of itself and its members who are construction purchasers and users in the greater Philadelphia area.

B. Proceedings in the District Court.

On April 3, 1973, the plaintiffs commenced the antitrust action against the petitioners and twenty-one (21) other labor organizations by the filing of a Complaint in the United States District Court for the Eastern District of Pennsylvania.

Count I of the Complaint alleges that the defendants unlawfully have combined and conspired in violation of Sections 1 and 2 of the Sherman Antitrust Act, 15 U. S. C. §§ 1, 2, among themselves and with non-labor entities to control the construction industry in the greater Philadelphia area by eliminating open-shop contractors from the industry, and to create a monopoly therein for the favored class of the union contractors.[3] Count I further alleges that defendants' conduct is beyond the scope of legitimate labor objectives since defendants: have no dispute with plaintiff Altemose or other open-shop contractors; have expressly disavowed any intent to organize employees of such contractors; have not sought negotiations with such contractors relative to wages, hours, conditions of employment of the employees; but rather, have sought to protect union contractors from competition by open-shop contractors and to create a monopoly for the favored union contractors (R. 13a-24a).[4]

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3. A union contractor is "a party to a contract with one or more of the defendant craft unions which requires that employees become or remain members of such craft union or unions on or after a specified period of employment" (R. 12a).

4. Since the record in this Court apparently consists of the printed volume entitled "Motion for Leave to File Petition for Writ of Prohibition and Writ of Mandamus, Petition for Writ of Prohibi-

Count II of the Complaint alleges that the named defendants have combined and conspired among themselves, the objectives and means of the conspiracy being identical to those alleged in Count I (R. 24a-27a).

The allegations of the Complaint are of restraints of the business and product market, not of the labor market. There are no allegations of unfair labor practices in the Complaint.

On July 16, 1973, defendants (including petitioners) moved to dismiss the Complaint, on various grounds, including that the District Court lacked subject matter jurisdiction over the action. On December 31, 1973, the District Court denied the respective motions to dismiss (R. 34a).

All of the defendants then sought permission to file an interlocutory appeal from the December 31, 1973, Order (R. 36a-39a), which motion was denied on March 12, 1974 (R. 41a).

Petitioners (and the other defendants), at that time, took no action to obtain appellate relief.

On April 18, 1974, plaintiffs served upon each defendant interrogatories (R. 43a-69a) and requests for the production of documents for inspection and copying (R. 70a).[5] Petitioners [6] objected to each and every question and to each and every request for production (R. 93a-104a, R. 105a-

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4. (Cont'd.)
tion and Writ of Mandamus, and Appendix" filed in the Court of Appeals by the Trades Council, citations to the record will refer to the page of that volume preceded by the letter "R" (*e.g.*, R. 7a). The lower case letter "a" refers to the appendix included in that volume.

References to parts of the record printed as appendices to the petitions for certiorari will be referred to by identifying letter and page number (*e.g.*, Trades Council Appendix D, p. 4a).

5. The Trades Council filed its Answer and Counterclaim on April 26, 1974 (R. 73a, et seq.); as did Local 542.

6. The Trades Council filed its objections on May 16, 1974; Local 542 filed its objections on May 20, 1974.

106a), whereupon, on June 21, 1974, plaintiffs moved to compel discovery (R. 108a-111a). Petitioners responded on August 7, 1974, and resolution is now pending. The District Court directed the parties to negotiate discovery requests and those negotiations are in process.

C. Proceedings in the Court of Appeals.

Meanwhile, on July 30, 1974, the Trades Council instituted an action in the United States Court of Appeals for the Third Circuit by filing a Motion for Leave to File Petition for Writs of Prohibition and/or Mandamus, asserting as a jurisdictional basis, the All Writs Act, 28 U. S. C. § 1651(a) (R. 4), and naming Judge Higginbotham as respondent. Local 542 filed its petition seeking identical relief on August 2, 1974.

The petitioners requested that the Court of Appeals prohibit the District Court from exercising jurisdiction (R. 32a-33a), and order it to dismiss the Complaint with prejudice (R. 33a), or in the alternative, to stay proceedings and certify issues of fact and law to the National Labor Relations Board (R. 34a).

The Court of Appeals denied Local 542's petition on August 12, 1974 (Local 542 Appendix D, p. 11a), and that of the Trades Council on August 13, 1974 (Trades Council Appendix D, p. 4a). The Trades Council filed its petition for writ of certiorari on October 11, 1974; it was served on plaintiffs' counsel on October 15, 1974. Local 542 filed and served its petition on November 8, 1974.

REASONS FOR DENYING THE PETITION.

A. The Court of Appeals Did Not Commit Error Warranting Review by This Court.

The relief sought here is review of the orders of the Court of Appeals denying the petitions for writs of mandamus and/or prohibition which petitions alleged there was no jurisdiction in the federal district court to hear plaintiffs' case. In so acting, the Court of Appeals did not commit error warranting review by this Court outside the normal appellate procedures.

Prohibition and mandamus are extraordinary remedies, utilized by this Court only in extraordinary cases. In *Ex parte Fahey*, 332 U. S. 258 (1947), Mr. Justice Jackson, for the Court, stated:

> "Mandamus, prohibition and injunction against judges are drastic and extraordinary remedies. We do not doubt power in a proper case to issue such writs. But they have the unfortunate consequence of making the judge litigant, obliged to obtain personal counsel or to leave his defense to one of the litigants before him. These remedies should be resorted to only where appeal is a clearly inadequate remedy. We are unwilling to utilize them as substitutes for appeals. As extraordinary remedies they are reserved for truly extraordinary cases." *Id.* at 260.

The use of the writ of mandamus, as was pointed out in *Roche v. Evaporated Milk Ass'n*, 319 U. S. 21, 26 (1943):

> "has been to confine an inferior court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority where it is its duty to do so."

The Court, in *Bankers Life & Casualty Company v. Holland,* 346 U. S. 379, 383 (1953) stated:

> "The supplementary review power conferred on the courts by Congress in the All Writs Act is meant to be used only in the exceptional case where there is clear abuse of discretion or usurpation of judicial power."

And, the hardship of incurring a trial that may be unnecessary is not reason for the granting of the extraordinary writs. *United States Alkali Export Ass'n v. United States,* 325 U. S. 196, 202-203 (1945).

The various forms of mischief such rules restricting interlocutory review by mandamus are designed to prevent were explicated in *American Construction Co. v. Jacksonville, etc.,* 148 U. S. 372 (1893), as evasion of the rule limiting review to final judgments, premature decision of causes pending in lower courts, repeated and oppressive appeals on the same questions, and subversion of the whole system of jurisprudence. *Id.* at 379.

In the context of the above-cited authorities, the Court of Appeals did not abuse its discretion, or depart from the accepted and usual course of judicial proceedings, in refusing to issue the writ.

B. The District Court Has Not Exceeded Its Jurisdiction.

The petitioners contend that the lower court lacks subject matter jurisdiction to hear the merits of the antitrust action because of the so-called immunity of labor organizations to antitrust regulation. For example, the petition of the Trades Council states "[t]he immunity of labor organizations from antitrust regulation is almost total . . ." (p. 12). The petition of Local 542 echoes, even more boldly, "[u]nions may agree among themselves to force the elim-

ination of non-union business, to improve their own business, without any violations of the antitrust laws" (p. 8). There is no support to the petitioners' use of the so-called immunity of labor as a bar to the jurisdiction of the lower court.

This Court has on many occasions held that whether a union is liable under the antitrust laws depends on whether the conduct of the union violates the Sherman Act. *Ramsey v. United Mine Workers,* 401 U. S. 302 (1971); *United Mine Workers of America v. Pennington,* 381 U. S. 657 (1963); *Amalgamated Meat Cutters v. Jewel Tea Co., Inc.,* 381 U. S. 675 (1965); *Los Angeles Meat Drivers Union v. U. S.,* 371 U. S. 94 (1962); *Allen Bradley Co. v. Local Union 3,* 325 U. S. 797 (1945); *United States v. Hutchinson,* 312 U. S. 211 (1941); *Apex Hosiery Co. v. Leader,* 310 U. S. 469 (1940). In not one of these decisions did the Court hold that a district court has no power, as a matter of subject matter jurisdiction, to hear an antitrust claim against a union.

The cases hold that the so-called immunity of labor is lost where there is a direct restraint of the product market pursuant to a conspiracy with non-labor sources, as alleged in Count I; *Pennington; Allen-Bradley, supra.* It is also lost where there is a conspiracy to eliminate competition and to create a monopoly for the benefit of the favored class of employers where the labor activity is outside the scope of the collective bargaining relationship or is not otherwise condoned by national labor policy, as alleged in Court II; *Jewel Tea; Apex, supra.* Accordingly, the courts below correctly determined that there is no jurisdictional bar to hear the present action where the Trades Council and its constituent labor organizations are alleged to have combined and conspired among themselves and with non-labor entities to control the construction industry in

the greater Philadelphia area by eliminating open-shop contractors and to create a monopoly for the favored class of union contractors where the petitioners' activities are alleged to be beyond the scope of normal and legitimate labor activities.

To the extent that petitioners contend the District Court should have deferred its findings of fact and conclusions of law to the NLRB under the so-called "Doctrine of Primary Jurisdiction," this Court has recognized both that the doctrine is one of judicial discretion and that in the context of an antitrust action where the issue was whether a union acting alone violated the antitrust laws by insisting on limiting the Employers' hours of operations within the context of collective bargaining agreements, it was within the sound and proper discretion of the lower court to hear the merits of the antitrust action without deferring the matter to the NLRB. *Amalgamated Meat Cutters v. Jewel Tea, Inc.*, 381 U. S. 675 (1965).

Thus, the action of the District Court, being one of discretion, is not subject to the extraordinary writ of mandamus, which writ applies where the duty of the lower court is ministerial. Finally, the lower court's exercise of its discretion is proper, as this Court recognized in the *Jewel Tea* case.

A final point raised by petitioners is that the plaintiffs should have joined the union contractors as defendants and that the failure to do so rendered the Complaint "fatally defective" (Local 542 Petition, p. 12).

The courts have long held that the joinder of additional conspirators as defendants in a claim under the antitrust laws is optional with the plaintiff. *Georgia v. Pennsylvania R. R.*, 324 U. S. 439, 463, 464 (1945); *City of Atlanta v. Chattanooga Foundry & Pipeworks*, 127 F. 23, 25, 26 (6th Cir. 1903), *aff'd*, 203 U. S. 390 (1906); *Sidney Morris & Co. v. National Ass'n of Stationers, Etc.*, 40 F. 2d 620, 624 (7th

Cir. 1930); *Martin v. Chandler*, 85 F. Supp. 131, 132 (S. D. N. Y. 1949); *State of Washington v. American Pipe & Construction Co.*, 280 F. Supp. 802, 804, 805 (S. D. Cal.), *aff'd*, 393 F. 2d 568 (9th Cir.), *cert. denied*, 393 U. S. 842 (1968); *Occidental Petroleum Corp. v. Buttes Gas & Oil Co.*, 331 F. Supp. 92 (C. D. Cal. 1971), *aff'd*, 461 F. 2d 1261 (9th Cir.), *cert. denied*, 409 U. S. 950 (1972). The cases cited by petitioners are clearly inapposite.

Even assuming that the courts below erred in rejecting this contention, such error is not so fundamental a jurisdictional defect as to justify review by the extraordinary writ of mandamus.[7]

C. Preliminary Disclosure of Information Not Otherwise Subject to Confidentiality Is Not of Such Imperative Public Importance as to Justify the Deviation From Normal Appellate Processes and to Require Immediate Settlement in This Court.

The District Court has not yet ruled on any discovery motions filed by plaintiffs, as Local 542 admits at Page 5 of its petition. Yet petitioners both contend that their possible exposure to discovery justifies the extraordinary relief they have requested.

The Trades Council acknowledges, on page 11 of its petition, that its purpose in seeking a writ of certiorari is to preclude the District Court from ruling on plaintiffs' discovery motions:

> "This petition represents the unions' last hope of avoiding the irreparable harm that will flow from

7. Although there are surface similarities between this action and *Connell Construction Co. v. Plumbers and Steamfitters Local Union No. 100* (No. 73-1256), in which this Court heard oral argument on November 19, 1974, that case did not involve the issue of the lower court's jurisdiction, as is raised by petitioners herein, so there is no reason to wait until the *Connell* case is decided before ruling on these petitions.

> even limited discovery by employer groups in a case where the District Court has no jurisdiction. * * *"

Similarly, Local 542 asserts, on page 5 of its petition:

> "It is obvious from all encompassing interrogatories as well the very nature of the suit, that the anti-union interests have launched a campaign to use discovery procedures in deadly inquisition into union activities which are protected and privileged * * *".

The petitioners state their potential exposure to discovery threatens them with the disclosure of information deemed confidential. The Trades Council states at page 24 of its petition:

> "The Circuit Court below has made certain that Altemose will have access to discovery procedures that can reveal the names of all union sympathizers on its payroll. * * * It is inconsequential that the District Court has not yet determined the limitations on 'relevant' discovery. The mere exercise of jurisdiction by the Court, coupled with the invocation of discovery procedures by plaintiffs, makes certain that some confidential information will be received by employer groups."

Clearly, where the District Court has not yet ruled, and where appellate relief from any future ruling is available, this case is not one of "imperative public importance". Since avoiding discovery is the true reason for the actions in the Court of Appeals and these petitions, the procedures are premature, as the District Court might well deny all or part of the motion to compel discovery or enter an appropriate protective order pursuant to Rule 26(c), Fed. R. Civ. P., and there is no evidence or indication that the District Court will not protect petitioners' rights under applicable law.

Furthermore, after the petition for certiorari was filed by the Trades Council, plaintiffs agreed, in discovery negotiations with petitioners, not to seek in discovery relating to the averments of the Complaint the names of union members or union sympathizers on Altemose's payroll, which information is the only material claimed as damaging by petitioners for purposes of their petitions to this Court. That discovery might become necessary regarding the class action allegations of petitioners' amended counterclaims, but that necessity will only arise when and if the district court determines that the counterclaims should proceed as a class action.

CONCLUSION.

For all of the reasons stated above, it is respectfully requested that Petitions for Writs of Certiorari to the United States Court of Appeals for the Third Circuit be denied.

Respectfully submitted,

November 15, 1974.

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